UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

TRANSCARE NEW YORK, INC.
Employer
and Case No. 29-RC-11762

INTERNATIONAL ASSOCIATION OF EMTs AND PARAMEDICS, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU LOCAL 5000
Petitioner

TRANSCARE NEW YORK, INC.
Respondent
and Case No. 29-CA-29632

INTERNATIONAL ASSOCIATION OF EMTs AND PARAMEDICS, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU LOCAL 5000
Charging Party

SUPPLEMENTAL DECISION ON OBJECTIONS, ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

On June 19, 2009,[1] International Association of EMTs and Paramedics, National Association of Government Employees, SEIU Local 5000, herein called the Petitioner or the Union, filed a petition in this matter seeking to represent certain employees employed by TransCare New York, Inc., herein called the Employer or TransCare. Pursuant to a Decision and Direction of Election issued by the Region on October 8, a mixed manual ballot and mail ballot election was conducted by secret ballot, among the employees in the following unit:

[1] All dates hereinafter are in 2009 unless otherwise indicated.

All full-time and regular part-time emergency medical technicians ("EMT's") and paramedics employed in the Employer's New York City 911/EMS Division, but excluding all EMT's and paramedics employed in the Employer's Ambulance Transport Division, Special Operations Division, and Westchester County 911/EMS Division, all other employees, dispatchers, ambulette drivers, guards, managers and supervisors as defined in the Act.

The manual balloting was conducted on November 17 and 18,[2] and the mail balloting was conducted from November 10th through November 24th. The ballot count took place on November 30th.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	362
Number of void ballots	3
Number of ballots cast for the Petitioner	99
Number of votes cast against participating labor organization	127
Number of valid votes counted	226
Number of challenged ballots	14
Number of valid votes counted plus challenged ballots	240

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes cast have not been cast for the Petitioner.

On December 7, the Petitioner filed timely objections to conduct affecting the results of the election. The Petitioner's objections are attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

[2] The manual election took place at six hospitals located in Manhattan, Brooklyn and the Bronx, New York.

The Employer, a Delaware corporation, with its principal office and place of business located at 25 14th Street, Brooklyn, New York, is engaged in the medical transportation business, providing critical care inter-facility transport, advanced life support transportation ("ALS"), basic life support transportation ("BLS"), emergency medical services under the New York City 911 system, and ambulette and Paratransit transportation in the New York City area.

THE OBJECTIONS

Objections A.1 through A.7 allege misconduct by the Employer. Objections B.1 through B.8 allege misconduct by the Board.

Objection A.1:

In this objection, the Petitioner alleges:

> The Board issued a Complaint against TransCare for engaging in unlawful surveillance and intimidation of employees. The Employer's illegal activity continued throughout the campaign and election. After the Complaint issued and immediately prior to the election, TransCare supervisors continued closely to monitor and intimidate employees who attempted to speak with the union by coming into areas they did not normally frequent when employees were speaking with union representatives. Supervisors ordered employees to leave areas where they were allowed to be when they were trying to speak with the union.

The Employer denies that it engaged in the alleged misconduct.

Evidence: Objection A.1

The Petitioner's offer of proof did not set forth any evidence in support of Objection A.1. However, the independent investigation revealed that on August 11, the Regional Office issued a Complaint and Notice of Hearing in Case No. 29-CA-29632, alleging that the Employer engaged in the following conduct in violation of Section 8(a)(1) of the Act:

> On dates presently unknown in or about April or May 2009, Respondent engaged in surveillance of employees to discover their Union activities by increasing the supervision of its employees;
>
> On dates presently unknown in or about April or May 2009, at the Bronx-Lebanon Hospital Center located at 1650 Grand Concourse, Bronx, New York, Respondent, by [Jackie] Felz, [Site Supervisor], created an impression among its employees that their Union activities were under surveillance by Respondent;
>
> On dates presently unknown in or about late May and June 2009, Respondent, by [Shannan] Greaves, [Director of the 911 Services Division], [Carrie] Boyd, [Citywide Evening Supervisor], and [Michele] Cohen, [Site Supervisor], at the Beth Israel Medical Center, located at 1st Avenue at 16th Street, New York, New York, engaged in surveillance of employees engaged in Union activities by following and speaking with employees while they were engaged in Union activities; and
>
> On or about June 3, 2009, Respondent, by Greaves and [Maryann] Sawyer, [Assistant Manager of the 911 Services Division], at the VIP Café located at 131 East Gun Hill Road, Bronx, New York, engaged in surveillance of employees engaged in Union activities by driving by a Union meeting occurring at the Café.

The independent investigation did not uncover any other evidence in support of Objection A.1. Although certain conduct alleged in the Complaint took place on "dates presently unknown in or about late May and June, 2009" and on June 3, there is no specific evidence placing the allegations of the Complaint within the critical period commencing on June 19, when the petition herein was filed.

Discussion of Objection A.1

Conduct which constitutes an unfair labor practice violation may also be the basis for invalidating an election, if the conduct "has a tendency to interfere with employee free choice." *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). "In some cases…there are objections to an election and an unfair labor practice charge, both of which encompass, in whole or in part, the same conduct. If after investigation merit

determinations have been made on the unfair labor practice charge and complaint has been authorized, then the complaint and the related challenges and/or objections normally should be consolidated for hearing before an administrative law judge." NLRB Representation Case Handling Manual, Section 11420.1.

An Employer's surveillance of employees' protected activities can constitute both an unfair labor practice violation and objectionable conduct in a representation case. For example, in *Partylite Worldwide, Inc*., 344 NLRB 1342, 1343 (2005), cited by the Petitioner herein, the Board directed a second election in light of the employer's objectionable surveillance, where management officials stood at the entrance to the employee parking lot on three occasions shortly before the election, closely observing union officials giving literature to employees. In *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007), also cited by the Petitioner, the employer violated Section 8(a)(1) of the Act when a manager went to the facility on her day off and stood at the side of the building, observing a meeting between union officials and employees in the nursing home parking lot. *Sprain Brook*, 351 NLRB at 1190-91. In the instant case, the surveillance alleged in the Complaint could be found to be both a Section 8(a)(1) violation and objectionable conduct, warranting the direction of a second election.

As a general rule, the Board does not consider instances of pre-petition conduct as a basis upon which to set aside an election. *Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). However, "the *Ideal Electric* rule does not preclude consideration of conduct occurring before the petition is filed where…such conduct adds meaning and dimension to related post-petition conduct." *Dresser Industries, Inc.,* 242 NLRB 74 (1979)(citing *Stevenson Equipment Company*, 174 NLRB 865, 866 n. 1

(1969)). In *Dresser Industries,* the Board held that "the single violation of Section 8(a)(1) of the Act which occurred during the critical pre-election period [was] but an extension of Respondent's consistent pattern of antiunion conduct ….the pre-petition conduct…[lent] additional meaning to [the mine foreman's] unlawful statements" shortly before the election. *Dresser*, 242 NLRB at 75.

In the instant case, the Complaint sets forth conduct occurring shortly before the critical period, and possibly (if the "dates presently unknown in June" were on or after June 19), within the critical period. The conduct alleged in the Complaint could "add meaning and dimension to related post-petition conduct," including the post-petition conduct alleged in Objections A.3, A.7, and B.7, on which I am directing a hearing in the instant case.

Accordingly, I direct that Objection A.1 be consolidated with the Complaint and Notice of Hearing in Case No. 29-CA-29632, to be heard by an Administrative Law Judge.

Objections A.2 and B.5

Objection No. A.2 alleges:

> During the on-site voting, Employer observers were communicating by phone and text message with TransCare management. Board agents who were conducting the election reprimanded the observers about communicating with management during the voting. The observers continued to text with management throughout the voting, violating election rules and intimidating voters.

Similarly, Objection B.5 alleges:

> The Employer's observers were allowed to communicate by phone and text message with TransCare management during the voting, thus intimidating voters. Despite being told to stop communicating with management, Employer observers continued to text with management throughout the voting.

The Employer denied the allegations of these objections.

Evidence: Objections A.2 and B.5

In its offer of proof, the Petitioner asserted that, "The TransCare observer at Brooklyn Hospital, Vanessa Johnson, was using her phone to text message when employees entered and exited the voting room. The Board Agent spoke to her, but she continued to text throughout the vote." Further, the Petitioner asserted that "at Bronx-Lebanon, TransCare observer Eileen Laboy was using her phone to text message when employees entered and exited the voting room." The Petitioner provided the names of two witnesses in support of these objections. However, the Petitioner did not furnish any evidence regarding the content of the alleged text messages, or whether any voter apart from the two witnesses noticed the text messaging activity or the Board Agent's instructions, if any.

Discussion of Objection A.2 and B.5

When the person responsible for conduct alleged to be objectionable is an agent of a party to the election, the proper standard for evaluating it is whether the conduct has "the tendency to interfere with the employees' freedom of choice." *Taylor Wharton Division, Harsco Corporation*, 336 NLRB 157, 158 (2001). An employee who commits misconduct while acting as an observer for a party is considered to be an agent of the party during the time of the misconduct. *Brinks Incorporated*, 331 NLRB 46 (2000). An objecting party "must present by "specific evidence…not only that…unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking,*

Inc., 821 F.2d 312, 316 (6th Cir. 1987)(per curiam)(quoting *Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969), *cert. den*., 484 U.S. 896 (1987)).

For example, in *Brinks*, *supra*., the Board concluded that the union observer interfered with employees' freedom of choice when, contrary to the Board agent's instructions, he told employees approaching the observer table to vote for the union. *Brinks*, 331 NLRB at 46; *but see S.F.D.H. Associates, L.P. d/b/a Sir Francis Drake Hotel,* 330 NLRB 638 (2000)(union observer's "innocuous" conversations with voters, in "repeated defiance" of the Board agent's instructions, were not objectionable, particularly in light of the union's large margin of victory). In *Hallandale Rehabilitation and Convalescent Center*, 313 NLRB 835 (1994), the union's observer "kept a list of those who voted, commented audibly on how each voter would vote, and directed derogatory remarks at those she deemed to be against the Petitioner." *Hallandale*, 313 NLRB at 837. The Board found that these actions "destroyed the integrity of the voting process by undermining measures to insure the secrecy of the ballot and creating a coercive atmosphere in the polling area." *Hallandale*, 313 NLRB at 837.

In the instant case, the Petitioner did not provide evidence that the Employer's observers kept lists of voters, made derogatory remarks, conversed with voters or engaged in electioneering. In the absence of evidence that the alleged text messages pertained to the election, or that any voter observed the content of the text messages, the Petitioner's offer of proof in support of Objections A.2 and B.5 fails to establish that the alleged text messaging interfered with employees' freedom of choice. Accordingly, I direct that Objections A.2 and B.5 be overruled.

Objections A.3 and B.7

Objection A.3 alleges that, "Management representatives were stationed immediately outside voting sites, further intimidating voters. Some 130 eligible employees did not cast a ballot." Objection B.7 alleges that, "Management representatives were allowed to stand immediately outside the voting sites, further intimidating voters."

Evidence: Objections A.3 and B.7

In its offer of proof, the Petitioner stated that at the Brooklyn Hospital voting site, on the first day of the election, TransCare supervisors Beth Perlowitz and Dawn Rose "were standing inside the emergency room during voting hours. The voting site, the EMS room, is off the emergency room." After being confronted by a pro-union employee and initially refusing to move, they "moved to the ambulance bay, which is where every employee had to enter to vote and was also within 50 yards of the voting site." On the second day of the election, "Ms. Perlowitz and Ms. Rose stood on the sidewalk on Dekalb Avenue right in front of the ambulance bay where all employees had to enter to vote. They were always within 50 yards of the voting site."

Further, the Petitioner alleged that at the Beth Israel voting site, "TransCare Senior Vice President of New York City Operations Doug Key and supervisor Michelle Cohen stood on the corner of Nathan Perlman Place within 50 yards of the voting site on both voting days. Mr. Keys spoke to employees as they entered and exited the area."

At the Mount Sinai voting location, according to the Petitioner, "TransCare supervisors Claudia Escoto and Jeff Ellis were standing on the street at the

corner of the emergency room driveway within yards of the ambulance bay. They were less than 50 yards from the voting site."

Finally, the Petitioner's offer of proof alleges that at the Montefiore voting site, "TransCare EMS Operations Director Shannon Greaves and EMS Operations Manager Maryanne Sawyer stood within 50 yards of the voting site or were seen leaning on their cars parked within 50 yards of the voting site on both voting days. Comments were made to Ms. Greaves about leaving the area but she remained." The Petitioner's offer of proof does not specifically indicate who made these comments to Greaves.

The Petitioner provided the names of two witnesses in support of these allegations, and copies of two e-mail messages[3] sent on November 17, the first day of the manual balloting. The first of these e-mails was from Jean Zeiler, Esq., attorney for the Petitioner, to Marcia Adams, Esq., the lead Board attorney in the instant case. It states, in relevant part:

> Finally, supervisors were standing in the ER at Brooklyn, Beth Israel, and Mt. Sinai within 50 yards and in view of the polls trying to intimidate the vote. Supervisors were standing in front of the crew room at Beth Israel where the vote was held. The Board agents should have authority over the actual conduct of the election, including instructing management personnel who are not observers to stay away from the polling places.

Shortly thereafter, Adams replied, in relevant part:

> As for your concerns about where the supervisors have been standing, Board Agents are only able to police the actual polling place and not areas outside of their control and do their best to make certain that the polling area is free of electioneering and supervisors. I will be glad to pass on your concerns to Cliff [Chaiet, Esq., attorney for the Employer] and suggest that he make certain that

[3] The Petitioner provided a 10-page pdf file containing a disorganized stack of printed e-mail messages. The e-mail messages were not arranged chronologically, or by Objection number, and the particular Objection to which each e-mail pertained was not identified. For the purposes of this report, the e-mails have been considered in support of the Objection(s) to which they appear to pertain, and in chronological order within each Objection.

supervisors are not hanging around the polling areas or they are subjecting the Employer to charges of objectionable conduct.

The Petitioner does not allege that the Employer's agents engaged in the conduct attributed to them within no-electioneering areas designated by the Board agents conducting the election.

The Employer's position statement asserted that, "the Employer's management and/or supervisory officials obeyed the instructions of the Board agents at the polling places with regard to where they could or could not stay during the course of the manual balloting…no member of the Employer's management entered into a polling site or into the no-electioneering areas designated by the Board agents at any time during the periods that the polling places were open. Further, the Employer is unaware of any eligible employee turning away from any polling place at any time during the periods the polling places were open."

Discussion of Objection A.3

Beth Israel, Mount Sinai and Montefiore Polling Places

The Board has held that "the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations." *Milchem, Inc*., 170 NLRB 362 (1968). However, electioneering by a party is not *per se* objectionable. The factors considered by the Board in determining whether such electioneering is objectionable include "whether the conduct occurred within or near the polling place…the extent and nature of the alleged electioneering…whether it is conducted by a party to the election or by

employees…[and] whether the electioneering is conducted within a designated 'no electioneering' area or contrary to the instructions of the Board agent." *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982). For example, in *Boston Insulated Wire*, agents of the Petitioner passed out a campaign leaflet and spoke to employees on their way to vote or work, as they entered a set of glass-paneled doors that was 10 feet from the polling place. *Boston Insulated Wire*, 259 NLRB at 1118-1119. This conduct was found not to be objectionable, because the electioneering was conducted away from the polling place, and the area in which the electioneering was conducted had not been designated a "no electioneering" area. In addition, the electioneering did not violate any instructions by the Board agent. Voters standing in line to vote were separated from the electioneering by the set of glass doors, which remained closed, and thus the electioneering was not specifically directed at employees waiting in line to vote. *Boston Insulated Wire*, 259 NLRB at 1119.

In the instant case, the supervisors and managers alleged to have been "stationed immediately outside" the Beth Israel, Mount Sinai and Montefiore polling places were approximately 50 yards away from the polling places. There is no evidence that they entered the polling places or no-electioneering areas, or disobeyed any instructions by Board agents. There is no evidence that any electioneering efforts were directed at employees waiting in line to vote. Accordingly, I direct that Objection A.3 be overruled, to the extent that it pertains to the Beth Israel, Mount Sinai and Montefiore polling places.[4]

[4]In support of this Objection, the Petitioner cited *Partylite Worldwide, Inc*., 344 NLRB 1342, 1343 (2005) and *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007), surveillance cases in which management officials observed employees conducting union activities in the parking lots of their respective facilities.

Brooklyn Hospital Polling Place

The Petitioner's offer of proof alleges that at Brooklyn Hospital, two supervisors were standing in areas that voters had to pass on the way to the polling place. In *Electric Hose and Rubber Company*, 262 NLRB 186 (1982), the Board found the "unexplained presence of…supervisors at points the employees had to pass in order to vote…to be coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election." *Electric Hose*, 262 NLRB at 216. Similarly, in *Performance Measurements Co., Inc*., 148 NLRB 1657 (1964), the Board held that, "the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct…by [which] the Employer interfered with employees' freedom of choice in the election." *Performance Measurements Co., Inc*., 148 NLRB at 1659. In *ITT Automotive*, 188 F.3d 375, (6th Cir. 1999), the Court upheld the Board's finding that "ITT supervisors had engaged in coercive behavior by positioning themselves in the center of the building and near the intersection of aisles through which employees had to pass in order to vote. The NLRB has held that such conduct interferes with an employee's freedom of choice in an election." *ITT Automotive*, 188 F.3d at 387 (citing *Performance Measurements Co., Inc*., 148 NLRB 1657, 1659 (1964)).

In light of the evidence that at Brooklyn Hospital, two supervisors were standing in areas that voters had to pass on the way to the polling place, which, if true, may require setting aside the election, I find that there are substantial and material issues, including issues of fact and credibility, that would be best resolved at a hearing. Therefore, I direct

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Partylite and *Sprain Brook* are factually distinguishable from Objections A.3 and B.7 herein, which do not allege that TransCare officials were close enough to the voting sites to observe the voting.

that a hearing be held before the Administrative Law Judge concerning Objection A.3, to the extent that it pertains to the Brooklyn Hospital polling site.

Discussion of Objection B.7

Objection B.7 is identical to Objection A.3, except that it alleges that the Employer's agents were "allowed" (presumably by Board agents) to stand immediately outside the voting sites, further intimidating voters. The Petitioner has not submitted evidence that Board agents were aware of this type of behavior, much less that they allowed it. Accordingly, I direct that Objection B.7 be overruled.

Objections A.4, B.2 and B.3:

In Objection A.4, the Petitioner alleges:

> TransCare management failed to verify the availability of election sites that they proposed. The result was that less than 72 hours prior to the election, the parties were notified that one of the voting sites was not available. A new site in a different building down the street from where employees report was posted 48 hours prior to the start of the voting. Another site was changed the morning of the election because management had not properly verified the site with the hospital. As a result, employees were directed to a totally different site when they arrived to vote. These two voting sites were the designated voting locations for over twenty-five percent (25%) of the total eligible voters. The lack of proper advance notice of the voting locations compromised the ability of employees to vote and the integrity of the election.

Objections B.2 and B.3 reiterate these allegations, further alleging that the Regional Office failed to confirm the availability of voting locations.

The Employer asserts that these objections lack merit. As noted above, the manual elections were scheduled to take place on November 17 and 18, at designated polling places within six New York City hospitals.

Evidence: Objections A.4, B.2 and B.3:

Union's Offer of Proof

In its offer of proof, the Petitioner stated that, "Montefiore [Hospital] was the site that was changed the morning of the election because management had not properly verified the site with the hospital. Employees were directed to a totally different site across the street when they arrived to vote…Bronx-Lebanon [Hospital] was the voting site that was changed less than 72 hours prior to the election. The new site was on the eighth floor of a different building down the street from where employees report. The Employer did not post the notice until 48 hours prior to the start of the voting." In support of these assertions, the Petitioner provided copies of the following e-mail messages:

E-mail Messages Pertaining to Bronx-Lebanon Election Site

Friday, October 23, Cliff Chaiet, Esq., to Marcia Adams, Esq.

Hi Marcia
Here are the locations at Montefiore and Bronx-Lebanon for the polling places:
Montefiore and St Barnabas—Montefiore at the 3300 Bainbridge Ave. building – Main Room, Lower Level. The entrance is on 208th street right off of Bainbridge.
Bronx Lebanon Hospital – 1650 Grand Concourse in the 1st floor "Staff Lounge" (next to the fast track area).

Sunday, October 25, Marcia Adams, Esq., to Jean Zeiler, Esq. (forwarding the October 23 e-mail set forth above)

Jean,
Cliff informed me on Thursday, I believe, that Employer felt that the crew rooms in both Montefiore and Bronx Lebanon Hospitals were too small in which to hold an election. They have offered 2 other rooms in place of the crew rooms. They are described in the email I am forwarding you now. I was not in the office Friday after 12:30 so I did not see this until today. At your earliest convenience please let me know the Union's position on the appropriateness of these 2 new rooms for the election.

Thursday, November 12, 11:16 a.m., Cliff Chaiet, Esq., to Marcia Adams, Esq.

Subject: Bronx-Lebanon Election Site

Hi Marcia
Just thought I'd brighten your day with this note. The site for the election at B-L is under construction and not usable. We're trying to find a suitable replacement site.
Cliff

Thursday, November 12, 1:22 p.m., Cliff Chaiet, Esq., to Marcia Adams, Esq.

Subject: Bronx-Lebanon Election Site

Marcia,

This is the best we can come up with at Bronx Lebanon:
Room 8C
Milstein Building
1650 Selwin Ave.
Bronx, New York
The contact people at the site will be Jim O'Connor, Vice President and Supervisor Jacqueline Felz.

Jeff Ellis will come over to your office to pick up the amended Notices when you tell me they are ready. They will be posted today.
Cliff

[The following e-mail is quoted within the November 12, 1:22 p.m., e-mail message:]

Adams, Marcia wrote:

Cliff,

As you know Notices must be posted 3 full work days—excluding weekends and holidays—in advance of the election. [Regional management] thinks that as long as the original notices have been posted an amended notice with bold letters announcing one new location might not be objectionable, notwithstanding the lack of three days advance posting. Time is of the essence so please let us know the new location as soon as possible. We will then call you and have your client pick up the amended notices today so they can be posted with equal haste. I am notifying Jean of this issue because we will need the Union's agreement on the new location. I am leaving at 4 today so I am hoping this can be resolved before then.

Thursday, November 12, 1:54 p.m., Marcia Adams, Esq., to Cliff Chaiet, Esq. (with a cc. to Jean Zeiler, Esq.)

Re: Bronx-Lebanon Election Site

Okay. I am notifying Jean of the new location and hopefully she will approve it. Once the notices are done I will notify you.
--Marcia

Thursday, November 12, 2:07 p.m., Cliff Chaiet, Esq., to Marcia Adams, Esq. (forwarded by Marcia Adams, Esq., to Jean Zeiler, Esq.)

Its on the 8th floor

Adams, Marcia wrote:
Is Room 8C on the first floor?

[The following November 13, 10:02 a.m. e-mail message from Zeiler to Adams and Chaiet was not included in the Petitioner's offer of proof:

Re: Bronx-Lebanon Election Site

Dear Marcia,
Upon further review, the Union is not pleased with the change in voting location for B-L, but we accept the new proposed site. We are wondering if the notice can indicate that this is the training room, or whatever it is that they use it for.
Thank you,
Jean]

[Also omitted from the Petitioner's offer of proof was the following November 13, 10:22 a.m., e-mail message from Adams to Zeiler:

Re: Bronx-Lebanon Election Site

Jean,
The room is not one that Transcare has used before, so they don't know if it is a training room. The notices will specify the room #, the floor it's on, the building name and address. If this is acceptable with the Union, we will have the notices done now. Please get back to me ASAP.
Thanks,
Marcia]

E-mail messages Pertaining to the Montefiore Hospital Voting Site

Tuesday, November 17, 11:09 a.m., e-mail, Jean Zeiler, Esq., to Marcia Adams, Esq. (with a cc. to a representative of the Petitioner)(quoted in relevant part below):

…Also, the voting site at Montefiore was changed this morning to a site across the street…

Tuesday, November 17, 12:11 p.m., e-mail, from Marcia Adams, Esq., to Jean Zeiler, Esq., to (with a cc. to Clifford Chaiet, Esq.) (quoted in relevant part below):

I am also aware of the change in location here at Montefiore. I can assure you that this was the hospital's doing as Transcare official Greaves and I tried in vain to convince them to give us access to the building on the notices. It appears that the hospital administrator made a mistake when he assigned 3300 to us because he meant to give us 3301 all along and despite his mistake, refused to allow us in 3300. There are signs on the door of 3300 as well as signs on 3301 directing voters to the changed polling site. As I understand it voters who [report to work] at the crew rooms at the 2 hospitals are being told of the new address. And, for most of the morning my colleague has been outside in the cold—for nearly 3 hours—in front of 3300 in order to direct any unknowing voters where to go. He informed me that almost all voters went to the new address without his assistance.

Employer's Position Statement

The Employer asserted that it initially proposed certain polling locations at the various hospitals in October, 2009. At the request of Board Agent Adams, the Employer confirmed the availability of the proposed locations on or about October 21, 2009 in e-mail correspondence with Ms. Adams.[5] Subsequently, on November 12, 2009, Supervisor Jacqueline Felz was notified by management at Bronx-Lebanon

[5] The file contains the following e-mail messages:

October 21, Adams to Chaiet:
In light of our last conversation the front office wants you to get confirmation from each of the six hospitals that they will allow the election to take place on their premises. We don't want any surprises on election day.
Thanks,
Marcia

October 21, Adams to April Wexler, Deputy Regional Attorney:
Cliff emailed me that all 6 hospitals are okay with having the election on site. He also says we can get the mailing labels by Friday morning.

Hospital that the area the Hospital had previously approved for the polling site was no longer available due to construction. The Employer's attorney immediately notified Board Agent Adams by e-mail of the problem and proposed a different location for the balloting at Bronx-Lebanon Hospital. Further, the Employer asserted that after receiving the Petitioner's November 13, 10:02 e-mail, agreeing to the new location (see above), "the Region prepared new Election Notices that were picked up from the Regional office and posted by the Employer. The Employer is unaware of any eligible employee being disenfranchised by the change of the polling place location at Bronx-Lebanon Hospital.

With regard to the polling site at Montefiore Hospital, the Employer asserts that it was given the address of the polling place by the Hospital, and this information was passed on to the Region before the original Election Notices were prepared. Unfortunately, the address the Employer was given was incorrect, a fact that was not discovered until around 5:30 a.m. on November 17, 2009, when the Board agents assigned to that polling site showed up. One of the two Board agents assigned to the polling site remained outside the original, and incorrect, location and directed voters to the new site. The Employer is unaware of any eligible employee being disenfranchised as a result of the mistaken address.

In a follow-up e-mail, the Employer's attorney confirmed that the original election notices were posted from midnight, November 5, continuously until sometime on Friday, November 13, when the Region provided TransCare with the corrected notices. The corrected notices, containing the correct address for the Bronx-Lebanon voting site, were posted from Friday, November 13, continuously through the close of the manual ballot election on November 18. The Employer takes the position that since it operates

seven days a week, 24 hours a day, Saturday and Sunday are working days. Thus, according to the Employer, the corrected election notices were posted more than 3 full working days prior to the day of the election, as required by Section 11314 of the NLRB Representation Casehandling Manual.

Discussion of Objections A.4, B.2 and B.3:

In *Madison Industries, Inc., of Arizona*, 311 NLRB 865 (1993), the initial version of the Notice of Election was posted for two working days. Subsequently, a Board agent delivered a corrected Notice of Election to the Employer, and explained that the initial Notice erroneously included the voter eligibility formula for employees in the construction industry. The initial Notice was then replaced with the corrected Notice, which was posted for an additional two working days. The Board held:

> It is uncontested that the notice of election was posted on September 3 and that at all times between September 3 and 11, either the original or the revised notice remained posted. The only difference between the notices was the inclusion of the inapplicable eligibility formula. There is no contention that the notice was in any other way inadequate or not in compliance with the Board's requirements. Moreover, there is no evidence that any employee was in any way prejudiced by the inclusion of the *Daniel* formula in the initial notice or the substitution of the corrected notice. We find that the election notice was posted for 4 full working days (September 4, 8, 9, and 10) before the day of the election, a period longer than required by the Board's Rules. Accordingly, we overrule the Employer's objection. *Madison Industries*, 311 NLRB at 865.

Similarly, in *Jumbo Produce, Inc.,* 294 NLRB 998 (1989), the Employer posted the Spanish language version of the Election Notice in a timely fashion, but "apparently due to inadvertence failed to post the English language version of the election notice until shortly prior to the election." *Jumbo Produce,* 294 NLRB at 1009. However, since there was "no evidence that any voters missed voting because the English version was not posted earlier," the objection was overruled. *Jumbo Produce,* 294 NLRB at 1009.

In the instant case, the Petitioner does not contend that the election notices were not posted for the required three full working days prior to the election. Rather, the Petitioner asserts that the original election notices gave two incorrect polling locations. However, as with *Madison Industries* and *Jumbo Produce*, the total amount of time that the Notice was posted met the Board's requirements. There is no evidence that any employee was in any way prejudiced by the change in polling locations at either the Bronx-Lebanon or Montefiore voting sites. Furthermore, the Petitioner agreed to the new location for the Bronx-Lebanon voting site. Moreover, the Petitioner concedes that the employees were directed to the correct Montefiore Hospital voting place. Accordingly, I direct that Objections A.4, B.2 and B.3 be overruled.

Objection A.5:

In this objection, the Petitioner alleges:

> The Employer-provided voting lists had numerous incorrect addresses and duplicate names on the on-site and mail ballot lists. The Employer continually had to correct the list after the deadline for submitting the lists. Addresses remained incorrect up to the date of the election. The Board notified the Employer of a returned mailing for incorrect address the day before the mail ballots were due.

The Employer takes the position that this objection lacks merit.

Because the election was to be conducted by mixed mail and manual balloting, the Employer was required to provide a master *Excelsior* list containing the names and address of all eligible voters, plus a separate list containing only the names of employees to vote by mail ballot. In addition, since the manual balloting was to take place simultaneously at six different polling places, the Employer was required to provide additional separate voting lists for each such polling place. Thus, one master list plus seven subsidiary lists were submitted.

Evidence Supplied by Petitioner: Objection A.5

In its offer of proof, the Petitioner reiterated Objection A.5 verbatim, adding that, "Email messages documenting the address problems are provided." As set forth below, the e-mails provided by the Petitioner concerned the following allegations: (1) the addresses for mail ballot voter John Spielberger and manual ballot voters Henry Ortiz and Festes Ogude were incorrect; (2) six voters appeared on more than one voting list, and their names were mixed up; and (3) the address for mail ballot voter Robinson Aupont was incorrect.

November 3, 2:23 p.m., e-mail from Jean Zeiler to Marcia Adams, Esq.

Dear Marcia,
The Union has found some additional problems with the [E]xcelsior list the employer provided. Henry Ortiz and Festes Ogude are listed at the same address; they do not share an address. We ask the employer to provide correct addresses for these individuals. We also appear to have an incorrect address for John Steelburger. Given the number of incorrect addresses found so far, the Union once again asks that the Board obtain payroll records to check the actual employment of employees in terms of eligibility to vote, particularly for part-time and per diem status.
Thank you,
Jean

November 3, 2:34 p.m., e-mail from Clifford Chaiet, Esq. to Jean Zeiler (with a cc. to Marcia Adams, Esq., and agents of the Employer)

Dear Ms. Adams and Ms. Zeiler
I just looked at the list that was forwarded to the Board by facsimile transmission on October 15, 2009. On that list, Mr. Ortiz and Mr. Ogude have very different addresses. Mr. Ortiz is at 143 Cleveland Street, Brooklyn, N.Y. and Mr. Ogude is at 596 Prospect Ave., Apt. 4, Bronx, N.Y. There is no John Steelburger on the voting list. There is a John Spielberger on the list at 170 Fenimore Street, Apt. F-4. We will confirm the address is correct.
Cliff Chaiet

November 4, 10:26 a.m., e-mail from Jean Zeiler to Marcia Adams, Esq., and Clifford Chaiet, Esq.

Dear Ms. Adams and Mr. Chaiet:

We need to point out that while the global [master] list transmitted on October 15th does have Mr. Ortiz and Mr. Ogude at the separate addresses, the list transmitted on October 26th, with the hospital breakdown (Mt. Sinai in this case), shows them at the same address. Although we understand they will be part of the manual ballot, we are concerned that the lists the Regional Office is using are accurate. Another problem is the list the employer provided for week day part-time employees, who the employer initially argued should have been part of the manual ballot. Since the Regonal office determined that all part-time and per diem employees would vote by mail, those individuals should be on the mail ballot list. It appears they may be on both the mail ballot and manual ballot lists at this point. With apologies for any spelling errors or omission of names, the individuals we have noted are: Gus Garcia, Steven Charles, Edith Hopkins, Ian Philips, Orlando Rivera, and Tony Bailey.

Given the number of names we have already pointed out with incorrect addresses, and in order to be sure we have accurate lists, the Union asks that the employer transmit by email the complete list of names and addresses of mail ballot voters – part-time and per diem, and the most updated manual voting lists by hospital.

Thank you,
Jean

November 4, 11:29 a.m., e-mail from Marcia Adams, Esq., to Jean Zeiler and Clifford Chaiet, Esqs.

Counselors:

The site lists will determine which employees will vote at each location. Therefore, it is imperative that they list only the names of employees who should be voting at their respective locations. To that end and in order to cut down on any confusion at the manual election, I request that the Employer check the individual site lists and make certain that they do not contain the names of any employees voting via mail ballot. If there are any mail ballot employees incorrectly placed on a site list, I request that the Employer submit a corrected list to the Region for any affected site.

Very truly yours,

Marcia Adams
Board Attorney

November 4, 1:39 p.m., e-mail from Clifford Chaiet, Esq. to Marcia Adams, Esq. (forwarded to Jean Zeiler, Esq., on November 4 at 3:02 p.m.)

As indicated in the e-mail I forwarded to you earlier, we have checked and determined that Ms. Zeiler is incorrect. The six names are the six people who would have been included in the manual voting had the Region not changed the plan to only mail ballots to per diems and week-end part-time employees. When the RD decision on the election came out, we provided you with mailing labels for the six people named by Ms. Zeiler. Cliff

November 4, 4:32 p.m., e-mail from Jean Zeiler, Esq., to Marcia Adams, Esq. (with cc. to Clifford Chaiet, Esq.)

Dear Marcia,
The problem with the employer's response below is that the names of five of the six people are on the hospital manual ballot lists. Furthermore, I am attaching the email forwarded previously that addressed these six people. The first and last names are mixed up on the chart. So, if the mail labels were based on this chart, the first names do not match the last names as set forth on the hospital lists. I would understand Cliff's email to say that mailing labels were provided for these individuals, while they are also on the manual ballot lists as follows: Bronx-Lebanon: Stephen Charles; Mount Sinai: Edith Hawkins and Ian Phillips; North General: Tony Bailey; Montefiore: Gustavo Garcia. You can see how the [first and last] names are mixed up from the chart below.

This is the prior email regarding the weekday part-timers:

—Original Message—

[from Marcia Adams, Esq., To Jean Zeiler, Esq., October 26, 9:56 a.m.]

Stephen	Charles	932 Carroll Street, #4-J	Brooklyn	New York	11225
Edith	Garcia	700 Shore Road	Long Beach	New York	11561
Ian	Hawkins	216 Rockaway Ave #23A	Brooklyn	New York	11233
Orlando	Phillips	707 E 52nd Street	Brooklyn	New York	11203
Tony	Rivera	350 E. 57th Street #1C	New York,	New York	10022
Gustavo	Bailey	162 Southaven Ave	Mastic	New York	11950

According to Cliff these are the only employees [who] would move from the manual ballot to the mail ballot list to conform to the Regional Director's letter of last week which states that all part-timers would vote in the mail ballot. If you agree we can keep things as they are and not have to change anything. Let me know a[t] your earliest convenience.

—Marcia

Monday, November 23, 4:04 p.m. e-mail from Marcia Adams, Esq., to Clifford Chaiet, Esq. (with a cc. to Jean Zeiler, Esq.)

Cliff,
We received the following returned ballot marked by USPS as "Unable to forward/for review."

Robinson Aupont, 463 Hancock St., #2, Brooklyn, NY 11233

Does your client have a corrected or updated address?

Thanks,
Marcia

Further Evidence: Objection A.5

The independent investigation established that the "master" *Excelsior* list containing the names and addresses of all eligible employees was timely provided by the Employer on October 15, as required by the Decision and Direction of Election. Thereafter, pursuant to the Region's request, the Employer provided six separate voting lists for each one of the six voting locations, plus a separate list containing the names and addresses of those voting by mail ballot, as well as a set of mailing labels for the mail ballot voters. On October 26, the Region forwarded these subsidiary lists to the Petitioner for review.

The Region's election records reveal that on November 16, pursuant to the Petitioner's request, the Region's election clerk sent a duplicate ballot to a second address provided for Spielberger, by Federal Express. It appears that the name of the street was misspelled on the eligibility list. The voting list for the mail ballot voters reflects that Spielberger voted in the mail ballot election.

With regard to Ortiz and Ogude, the file contains a November 4 e-mail message from Chaiet to Adams and Zeiler, reflecting that the Employer provided a further

correction to Henry Ortiz's address on that date. With regard to Festes Ogude, as indicated in the e-mail messages provided by the Petitioner, there is no dispute that the address provided on October 15 for this individual was the correct one.

With regard to the six voters alleged to be on duplicate lists, the Region's records revealed that these individuals were part-time employees whose names were removed from the manual voting lists and placed on the mail ballot voting list. Although the first and last names of five of these six voters became mixed up in the Board agent's e-mail, the independent investigation also revealed that the full names of these voters appeared correctly on the master list as well as on the mail ballot mailing labels.

With regard to Aupont's returned mail ballot, the Region's records show that in response to the Board agent's November 23 request, later that day the Employer provided the Region with a second address for Aupont. The Region's records also show that a duplicate ballot was sent to the second address via Federal Express on November 23. The voting list reflects that Aupont did not vote in the mail ballot election.

The independent investigation also disclosed that on October 26, the Board agent sent the parties' attorneys an e-mail message (not included in the Petitioner's offer of proof) setting forth the names of 18 employees. The e-mail message explained that the letters mailed by the Petitioner to these employees at the addresses contained on the master *Excelsior* list had been returned by the United States Postal Service. The following day, the Employer provided second addressees for 15 of the 18 employees, advising that two of the 18 employees had been terminated. During the investigation of these Objections, the Employer advised that a third employee, whose second address was not provided on October 27, had not worked for TransCare since July 25.

In response to a Board agent's questions regarding the incorrect addresses, the Employer explained:

> The address list for the *Excelsior* list and the 18 employees in question was pulled as a report from our Payroll/HRIS system. TransCare works hard to keep this data accurate, but we are at the mercy of employees as far as ensuring that we have their most current address and other personal information. We proactively try and keep the data current by obtaining info from employees at events like employee benefits enrollments, when employee credentials like EMT cards and driver licenses expire and we get new copies or when mailings to employees come back as "address unknown" or "forwarding time expired" etc…However, we always have situations where employees move, change phone numbers etc… and do not let us know.
>
> When the 18 addresses came over as inaccurate, we reached out by phone individually to each of the employees to obtain and verify a current address and then updated the payroll/HRIS system.

Discussion of Objection A.5

In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board established a requirement, to be "applied in all election cases," that within 7 days after the Regional Director has approved a consent-election agreement, or after the Regional Director or the Board has directed an election,

> ...the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear*, 156 NLRB at 1239-40.
>
> In establishing this requirement, the Board emphasized its statutory obligation:
>
> ...to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice...[such as] a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning

> representation is in a better position to make a more fully informed and reasonable choice. *Excelsior Underwear*, 156 NLRB at 1240.

The Supreme Court agreed that the *Excelsior* requirement furthers the objective of ensuring the fair and free choice of bargaining representatives, "by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses." *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, 767, 89 S.Ct. 1426, 1430 (1969).

In *Women in Crisis Counseling & Assistance,* 312 NLRB 589 (1993), the employer submitted an *Excelsior* list with the names and addresses of 20 eligible unit employees. The employer obtained the addresses from its personnel files. When informed that six of the 20 addresses, or, 30%, were incorrect, the employer immediately obtained and submitted corrected addresses. In determining that the employer had substantially complied with the *Excelsior* rule, the Board observed that it "has consistently viewed the omission of names as more serious than inaccuracies in addresses. …We do not mean to suggest that inaccurate addresses, standing alone, can never be the basis for finding that an employer has not substantially complied with the *Excelsior* rule. In addition, the Board may set aside an election because of an insubstantial failure to comply with the *Excelsior* rule if the employer has been grossly negligent or acted in bad faith in providing inaccurate addresses." *Women in Crisis Counseling & Assistance,* 312 NLRB at 589 (1993). However, the Board found that "the number of address inaccuracies in the *Excelsior* list was not substantial enough to require setting aside the election," and that "the inaccurate addresses were not the result of gross negligence or bad faith." *Women in Crisis Counseling & Assistance,* 312 NLRB at 589 (1993).

The Board may conclude that an employer has substantially complied with the *Excelsior* rule despite a finding that the employer was negligent (as opposed to grossly negligent) in preparing its *Excelsior* list. In *Texas Christian University*, 220 NLRB 396 (1975), the names of about 3% of the eligible voters were omitted from the *Excelsior* list and about 18% of the addresses on the *Excelsior* list were incorrect. *Texas Christian University*, 220 NLRB at 397, 397 n. 6-7. The Board observed, "[W]hile the Employer may have been negligent in not supplying the address changes it apparently received before the election, it was not grossly negligent in that regard." *Texas Christian University*, 220 NLRB at 398. Although four employees were intentionally omitted from the list "on advice of counsel and because the Employer believed part-time employees were not covered in the unit," (at 397), the Board did "not think these errors were so substantial as to require the setting aside of the election. *Texas Christian University*, 220 NLRB at 398.

However, in *Merchants Transfer Company*, 330 NLRB 1165 (2000), the employer's conduct demonstrated gross negligence or bad faith, and the Board directing a second election. *Merchants Transfer*, 330 NLRB at 1165. There, although the Employer's president "knew that a significant number of employee addresses on the *Excelsior* list were incorrect, he nevertheless forwarded [the list] to the Union" even though supervisors maintained updated lists of employee telephone numbers, and the Employer could have telephoned employees to verify the accuracy of the addresses on the *Excelsior* list. *Merchants Transfer*, 330 NLRB at 1165. The addresses of 22.41 percent of the employees on the *Excelsior* list were incorrect. *Merchants Transfer*, 330 NLRB at 1165.

In the instant case, the evidence indicates that 21 or 22 out of 362 voters, or 6%, of the addresses on the *Excelsior* list were incorrect. There is no evidence of gross negligence or bad faith in the construction of the list. The Petitioner does not claim that the Employer failed to provide correct addresses when it learned of the errors, or that the Region failed to provide voters with duplicate ballots. In addition, although the first and last names of five voters may have been mixed up at one point, the mistake was promptly corrected. In these circumstances, I direct that Objection A.5 be overruled.

Objection A.6:

In this objection, the Petitioner alleges:

> After discharging an off-duty employee who was not in uniform for speaking about the union with another off-duty employee who was in uniform, the Employer allowed on-duty employees in uniform to campaign against the Union. Supervisors advised on-duty employees to do anything they could to defeat the Union. An unfair labor practice charge is pending on this violation.

The Employer takes the position that the objection lacks merit.

The conduct alleged in Objection A.6 was previously alleged in Case No. 29-CA-29893, which was dismissed for lack of cooperation. An appeal was filed regarding the dismissal of Case No. 29-CA-29893, but on January 20, the Office of the General Counsel denied the appeal.

Despite repeated reminders of the necessity of supplying evidence in support of each objection,[6] the Petitioner did not supply any evidence in support of Objection A.6,

[6] In a letter from the Region dated December 9, 2009, the Petitioner was asked to submit within seven days of the Objections, "at a minimum, the names of each of your witnesses for each objection, a succinct description containing specific probative content or substance of the relevant testimony for each individual, any relevant documents, and your legal arguments in support thereof, sufficient to establish a *prima facie* finding." In a facsimile message dated December 9, 2009, the Board agent investigating the objections reaffirmed that the Petitioner's "submission should include a list of the witnesses and a brief description of the testimony of each. It should set forth specific facts, such as location and time of occurrence, what was said, number (and names) of employees affected, and names of managers involved. In an e-mail dated

or attempt to summarize the evidence it had. In the absence of any evidence in support of this Objection, I direct that it be overruled.

Objection A.7:

In this objection, the Petitioner alleges:

> The Employer prevented the Union from posting pro-union notices on bulletin boards, but allowed antiunion notices to be posted inside locked bulletin boards that were supposed to be only for employment-related notices and could only be opened by supervisors or managers. An unfair labor practice charge is pending on this violation.

The Employer asserts that this objection lacks merit.

The conduct alleged in Objection A.7 was previously alleged in Case No. 29-CA-29893, which was dismissed for lack of cooperation. As noted above, the appeal of the dismissal of Case No. 29-CA-29893 was denied.

In support of Objection A.7, the Petitioner asserts that its employee witness would testify that during the week of October 19, Employer supervisors knew that a unit employee, who is not a supervisor or manager of the Employer, posted anti-Union notices inside locked TransCare bulletin boards maintained by the Employer at NYU, Mount Sinai, North General, and other hospitals where bargaining unit members work. During that same week, the witness was told by an Employer supervisor, Escoto, that employees were not allowed to post union literature on the Employer's bulletin boards. Previously, sometime in June, the witness was told by TransCare supervisors Cohen and Greaves that employees were not allowed to post union literature at any of the hospitals where unit

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December 10, responding to the Petitioner's initial submission, the Board agent investigating the objections reminded the Petitioner to "please provide evidence in support of objections A1, A6, A7 and B8, even though the first three of these overlap with pending ULP's. It is extremely important to provide evidence in support of each and every objection."

members work. The witness would also testify that when employees left union literature at the hospitals, the Employer removed that literature.

Discussion of Objection A.7

When an employer "prohibits the posting of material relating to and in the course of concerted activity of its employees, while having previously allowed the posting of other miscellaneous matters by the employees," it improperly infringes on the rights of employees to engage in Section 7 activity and "den[ies] employee access to an important medium of communication during a campaign," warranting that the election be set aside. *Waste Management, Inc*., 330 NLRB 634 (2000); see *Allied Mechanical, Inc*., 343 NLRB 631 (2004)(removal of union literature from employee posting areas while permitting other non-work-related notices to remain, found objectionable); *St. Vincent Health System,* 330 NLRB 1051 (2000)(same).

In light of the evidence tending to show that the Employer discriminatorily enforced its bulletin board policy during the critical period, such conduct, if true, may warrant setting aside the election. Since there are substantial and material issues, including issues of fact and credibility, that would be best resolved at a hearing, I direct that a hearing be held before the Administrative Law Judge concerning Objection A.7.

Section B. – Objections to Conduct of the Election

Objection B.1:

In this objection, the Petitioner alleges:

> After the long delay in issuing a decision, the Regional Office failed to schedule the election in a timely fashion, which caused great hardship to the Union and employees in this highly contentious election. Representation petitions are considered of utmost priority for processing. The NLRB Representation Case-handling manual states that elections should take place within 30 days of issuance of a decision. In this case, the parties discussed dates for the election soon after

the decision issued on October 8, 2009. The Union requested a manual ballot. The Employer requested a mixed manual and mail ballot. The Regional Director directed a mixed manual and mail ballot.

The Board initially suggested that mail ballots would go out on October 27th with a return two weeks later and a count on October 30, 2009.[7] The manual vote would occur over two days during the two-week period. Without any further discussion, the Regional Director issued an election notice dated October 1, 2009, setting the manual ballot election for nearly one month later on November 17th and 18th. The mail ballot was scheduled for November 10th until November 24th. Since the election was now scheduled to end the week of Thanksgiving, the Regional Director determined that the count could not occur until six days later on November 30th.

The Union submitted a letter objecting to the further delay of the election. The Regional Director failed adequately to explain why the manual ballot was pushed another two weeks beyond the original suggested date (40 days from the decision) or why the mail ballot had to extend beyond the manual voting dates rather than scheduling the mail ballot so it would end before or on the date of the close of the manual ballot.

The extraordinary length of time of 105 days between close of the hearing and vote count was caused solely by the length of time the Regional Office took to issue a decision and the unexplained delay in scheduling the vote. The Union did nothing to cause such a delay. The delay caused precisely the hardship in organizing that the Board seeks to avoid by directing expeditious processing of representation petitions. The Union was required to maintain a campaign among this workforce that is spread across five boroughs and multiple hospitals while the Employer was able to continue the unlawful intimidation and surveillance of employees. The risk of improper influence on employees was increased during the long time period. As specified above, the Employer fully capitalized on the delay.

The Petitioner's offer of proof does not identify any potential witnesses who would testify regarding this objection, or set forth facts to which such a witness would testify.

[7] The Employer's attorney, Cliff Chaiet, provided a copy of an October 16 e-mail to TransCare management officials, summarizing his understanding of what the Board was proposing at that time. According to the October 16 e-mail, the Board was proposing to mail out the mail ballots on October 27, with a return date of November 10. The manual elections would occur over two days, November 3 and 4, and the all ballots would be counted on November 13 (not on October 30 as the Petitioner believed).

Discussion of Objection B.1:

The Board has held that, "Objections, to merit investigation by a Regional Director, must be reasonably specific in alleging facts which *prima facie* would warrant setting aside an election…a general conclusion, devoid of any specific content or substance…fails to satisfy the Board's requirement of reasonable specificity in the filing of objections." *Audubon Cabinet Company, Inc*., 119 NLRB 349, 350-51 (1957). Where an objecting party fails to submit names of witnesses, or specific evidence regarding the content of its' witnesses' testimony, the Board will "conclude that the [party] did not furnish sufficient evidence to provide a *prima facie* case…[or] require the Regional Director to investigate the objection further." *Aurora Steel Products*, 240 NLRB 46 (1979). An objecting party "must present by "specific evidence…not only that…unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking, Inc*., 821 F.2d 312, 316 (6th Cir. 1987)(per curiam)(quoting *Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969), *cert. den*., 484 U.S. 896 (1987)).

Here, the Petitioner failed to provide names of witnesses in support of Objection B.1, to identify specific testimony that its witnesses would provide in support of this objection, or to furnish evidence that the delays affected the results of the election. In light of the Petitioner's failure to furnish specific evidence in support of Objection B.1, further investigation of this objection is not warranted. Accordingly, I direct that Objection B.1 be overruled.

Objection No. B.4:

In this objection, the Petitioner alleges:

> The Regional Office failed to maintain laboratory conditions for the vote. At least one Board agent turned away voters who were not on the voting list rather than letting them vote under challenge.

The Employer asserts that this objection lacks merit.

In support of this objection, the Petitioner asserts that is election observer at the Einstein Hospital poll will testify the Board agent conducting the election at that polling site turned away at least one part-time/per diem employee, Aguirre, who appeared to vote rather than allowing the voter to use a challenged ballot."

The Petitioner also provided a copy of a November 17 e-mail from Zeiler to Adams, the Board agent in charge of the case, which states in relevant part:

> Apparently the Board agents at Beth Israel and Montefiore turned away per diem voters who never got ballots rather than letting the people vote under challenge. Please get a message to your agents that everyone should be allowed to vote.

Shortly thereafter, Adams replied:

> I am at the Montefiore site. As for the per diem employee I explained that if he did not want to vote subject to challenge he could contact our office to get a mail ballot. I was about to give him the number when he had to go out on a call. However, he returned soon after and said he wanted to vote subject to challenge. I tell any voter who comes in who is on another site list if you want to vote not subject to challenge you have to go to your designated site. If you don't mind voting subject to challenge you can vote here. I let them decide and not everyone decides the same way. I am confident my colleagues are explaining the process to the voters accurately.

In an e-mail message, the Employer stated that its observer at the Einstein Hospital polling site recalled that a Board agent told Aguirre that he was on the mail ballot list, and that "if he did not get a ballot by the end of the day to call the hotline and they would mail him another." According to the Employer's observer, Aguirre was therefore "turned away" from the manual voting at the Einstein location.

The Region's records show that the Region mailed Aguirre a duplicate mail ballot, and that Aguirre's name was checked off by the parties on the mail ballot eligibility list, indicating that his ballot was opened and counted at the ballot count.

Discussion of Objection No. B.4:

At most, the evidence shows that a voter who was to vote by mail ballot appeared at the manual polls seeking to vote in person, and the Board agent declined his request. Since this voter cast a ballot by mail, there was no prejudice to the voter and the Board agent's alleged conduct, if true, had no impact on the outcome of the election. Accordingly, I direct that Objection B.4 be overruled.

Objection B.6:

In this objection, the Petitioner alleges:

> In regard to the mail ballot, the Board agent incorrectly numbered the outside envelopes so the numbers did not match with the numbers on the voting lists. The signatures on several of the ballots were difficult to decipher. Since the numbers did not match with the lists, the Board agent and observers could not even attempt to determine the names of the voters.

The Employer asserts that this objection lacks merit.

To understand the gravamen of this objection, a brief description of the Agency's support staff procedures for arranging a mail ballot election is necessary. Section 12141.2 of the Regional Office Support Staff Procedures Manual provides that in mail ballot elections, upon receipt of the eligibility list, which should contain the current or last known address of each person who is to vote by mail, [the support staff employee should] place a "key" number (numbering consecutively) beside the name of each employee who is to vote by mail. Address an envelope to each employee on the "mail in" list and enclose the following:…A ballot (In a "mixed" manual-mail election, the

color of the mail ballot should be the same as that used in the manual election), Form NLRB-4647, (blue) Mail Ballot Envelope, in which the voter seals his/her ballot, a Yellow Bar-Coded Return Envelope on which is typed or stamped the return address of the Regional Office, Sub-Regional office, or Resident Office. Insert the case number and the eligibility key number of the voter on the tab that is a part of the envelope, Form NLRB-4175, Instructions to Eligible Employees Voting by United States Mail. Insert deadline date for return of ballot, and Form NLRB-4910, Notice of Election for employees voting by mail ballot.

The voter instruction Form NLRB-4175 provides, inter alia, that in order to maintain the secrecy of the ballot, the voter is to place the marked ballot in the blue envelope and seal the envelope. Then, the voter is to place the blue envelope containing the marked ballot into the yellow addressed return envelope and sign the back of the yellow return envelope in the space provided.

Section 11336.5(b) of the Board's Casehandling Manual provides that in mail ballot elections, at the time scheduled for the count, the returned envelopes are treated as "voters" approaching the checking table. The observers at the table make their marks alongside the respective names on the list. The observers may, if they wish, challenge ballots. Challenged ballots should not be opened, but simply labeled "challenged" on the yellow outer return envelope. After the yellow outer return envelopes have been checked against the list, all should be opened at once. Next, the blue ballot envelopes should be mixed thoroughly before the envelopes are opened and ballots are extracted. The ballots should be mixed again before being counted.

In support of this objection, the Petitioner asserts that during the count of ballots which took place at the Regional office on November 30, yellow return mail ballot envelopes were mis-numbered, so that all signatures had to be checked against the *Excelsior* list. All the numbering was off by one to three digits. At least ten of the mail ballots were challenged because the Board Agent and observers could not decipher the signatures and could not even attempt to match the envelope and list numbers. The Petitioner did not submit any further evidence in support of this objection.

The Employer agrees that the numbers on the yellow return envelopes did not match those on the *Excelsior* list, but that "the parties were able to ascertain the eligibility of most of the voters who voted by mail ballot, and their ballots were co-mingled with the ballots cast manually and counted. The envelopes that the parties could not identify were challenged and put aside. The total number of these challenged envelopes (11) did not affect the outcome of the election."

The independent investigation confirmed that many numbers on the yellow return envelopes did not match the numbers on the *Excelsior* list used at the count. The Employer had furnished the *Excelsior* list in two different formats: a "mailing label matrix" and a separate list that was not in mailing label format. The names on the two lists were not in the same sequence. It appears that a support staff employee numbered the mailing label list correctly when preparing the mail ballots. Regrettably, an incorrectly numbered non-mailing label list was inadvertently brought to the vote count, instead of the photocopy of the original mailing label matrix, on which the key numbers correctly matched those on the yellow return envelopes.

Discussion of Objection B.6:

There is no dispute that the number of challenged ballots was insufficient to affect the outcome of the election. Further, the mis-numbering of the voting list, while regrettable, did not impact on the results of the election. Indeed, during the count, the parties were able to resolve all but 11 of the mis-numbered envelopes. It appears that the Petitioner in this objection is now seeking to challenge the mis-numbered ballots that were opened and counted.

To warrant consideration, "challenges to voters must have been made before the questioned ballots were dropped into the ballot box…[t]he merits of postelection challenges, whether filed as such or in the guise of objections, should not be considered." *Superior Truss & Panel, Inc*., 334 NLRB 916, 917 (2001)(quoting Section 11362.1 of the NLRB Representation Case Handling Manual). Thus, "permitting 'questionable' employees to vote and later objecting to their inclusion necessarily forecloses the objection itself." *Superior Truss & Panel*, 334 NLRB at 917. It appears that Objection B.6 is a challenge in the guise of an objection, and thus should not be considered. Accordingly, I direct that Objection B.6 be overruled.

Objection B.8:

In this objection, the Petitioner alleges:

> The Regional Office ignored the Union's request to verify eligibility of part-time and per diem employees. The Employer maintained throughout the hearing that the EMS/911 Division had 275-300 employees. The lists provided contained nearly 400 names. The Regional Office refused to verify voter eligibility with payroll records.

The Employer asserts that this objection lacks merit.

Evidence: Objection B.8:

In support of this objection, the Petitioner submitted a letter dated October 23, addressed to the Regional Director, stating, inter alia:

> The IAEP also reiterates our concern about the [E]xcelsior list. As we have discussed with your office, the Employer maintained throughout the hearing that the EMS/911 Division has 275-300 employees. The list provided contains nearly 400 names. The IAEP requests the list of names and addresses of part-time and per diem employees that the Employer has been ordered to produce. The Union asks that the Employer produce payroll records for the employees demonstrating their eligibility as part-time or per diem employees in accordance with Board law. Finally, the IAEP requests the lists of employees' names and addresses by manual voting location.

The Petitioner also submitted a November 3 e-mail message to Board agent Adams stating in relevant part:

> Given the number of incorrect addresses found so far, the Union once again asks that the Board obtain payroll records to check the actual employment of employees in terms of eligibility to vote, particularly for part-time and per diem status.

The Employer takes the position that the appropriate process for questioning the eligibility of employees on the *Excelsior* list submitted by the Employer is the challenge procedure. The Employer notes that the only employees challenged by the Petitioner were those whose ballots could not be identified due to the mis-numbering of the envelopes referred to in Objection B.6. Finally, the Employer asserts that three or four others whose eligibility was initially challenged by the Petitioner at the ballot count on November 30 were resolved in favor of their eligibility when the Employer provided Petitioner's representative with payroll information detailing the employees' work record.

Discussion of Objection B.8:

The Petitioner had the opportunity to challenge voters whom it believed to be ineligible during the manual balloting, and during the ballot count when the mail ballots were opened. Several such challenges were resolved on the basis of payroll information that the Employer brought to the ballot count. The Petitioner now argues that as many as 100 additional voters may have been ineligible to vote.

In this Objection, the Petitioner is apparently attempting to challenge voters whose ballots have already been opened and counted. As noted in connection with Objection B.6, however, "challenges to voters must have been made before the questioned ballots were dropped into the ballot box…[t]he merits of postelection challenges, whether filed as such or in the guise of objections, should not be considered." *Superior Truss & Panel, Inc*., 334 NLRB 916, 917 (2001). It appears that Objection B.8 is a challenge in the guise of an objection. Accordingly, I direct that Objection B.8 be overruled.

SUMMARY AND DETERMINATIONS

In summary, I have directed that Objection 1 be consolidated with the Complaint and Notice of Hearing in Case No. 29-CA-29632, to be heard before an Administrative Law Judge.

Further, I have directed that a hearing be held before an Administrative Law Judge concerning Objection A.7, as well as Objection A.3, to the extent that Objection A.3 pertains to the Brooklyn Hospital polling site.

I have further directed that Objections A.2., A.4, A.5, A.6, B.1, B.2, B.3, B.4, B.5, B.6, B.7 and B.8, be overruled, as well as Objection A.3, to the extent that it pertains to the Beth Israel, Mount Sinai and Montefiore polling sites.

NOW, THEREFORE, the undersigned, having duly considered the matter and deeming it necessary in order to effectuate the policies of the Act, and to avoid unnecessary cost or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that these cases be consolidated for the purpose of hearing, ruling and decision by an Administrative Law Judge, and thereafter, that Case No. 29-RC-29-RC-11762 shall be transferred to and continued before the Board in Washington, D.C., for further processing and the provisions of Section 102.69 of the Board's Rules and Regulations shall govern the filing of Exceptions.

PLEASE TAKE NOTICE that on **April 6, 2010**, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this Supplemental Decision by filing a request with the Executive Secretary, National

Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on 5 p.m., EST on **March 4, 2010,** unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically**. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board

may grant special permission for a longer period within which to file.[8] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated: February 18, 2009, Brooklyn, New York.

/s/ "{John J. Walsh]"

[8] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.